OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

UNITED STATES - CERTAIN MEASURES AFFECTING IMPORTS OF POULTRY FROM CHINA
WT/DS392

December 15, 2009

1. Mr. Chairman, members of the Panel, and staff of the Secretariat: on behalf of the United States, we would like to thank you for your ongoing work in this panel proceeding.

2. The United States has set out our positions in full in our first written submission. Our oral statement this afternoon will summarize and highlight our views on major issues in this dispute.

I. Introduction

3. China's First Written Submission and its oral statement today repeatedly overlook two of the most important aspects of the measure in dispute: first, that Section 727 was adopted in the context of an ongoing food safety equivalency procedure addressed to poultry products from China. Second, that Section 727 was of only limited duration and effect. A proper examination of Section 727 under relevant WTO rules requires both of these facts to be fully taken into account.

4. First, under the U.S. system for ensuring the safety of imported poultry products, the U.S. authority that oversees the food safety of poultry products must determine that the exporting country has a poultry inspection system that achieves the same level of sanitary protection as the U.S. system. We would highlight that the equivalency determination is not addressed to the food safety of particular products, but to the equivalency of the inspection system of the exporting country. And we would also emphasize that China does not contest the right of a WTO Member to adopt an equivalency-based food safety system.

5. China seems to argue that Section 727 was allegedly "discriminatory" simply because the measure mentions China, and not other WTO Members. But this argument ignores the fundamental point that Section 727 was addressed to China because the measure was an exercise of Congressional oversight over the ongoing equivalency procedure involving China's poultry inspection system. An action taken in the context of an equivalency review of a particular country's food safety inspection system will, by its very nature, make explicit reference to that country. The country-specific nature that is inherent in an equivalency review does not, as China seems to argue, automatically raise questions of "discrimination."

6. Second, Section 727, on its face, was of only limited duration and effect. Neither 727, nor any other U.S. measure, imposed an indefinite restriction on the completion of the equivalency procedures applicable to China's poultry inspection system. Rather, Section 727

applied for a period of less than seven months, and was intended to ensure that the impact of the crisis of Chinese food safety enforcement was properly considered. The measure has now expired. Under a separate measure, Section 743 of the Fiscal Year 2010 agriculture appropriations act, the funding restriction has been removed. Section 727 also applied only to the establishment or implementation of equivalency rules for Chinese poultry; it did not prohibit – and indeed contemplated – the consideration of issues related to China's food safety enforcement system during the period subject to the measure. In short, the measure at issue was an intermediate and now completed step in an ongoing review of the equivalency of China's food safety enforcement system as applicable to poultry products.

7. Thus, to the extent that China establishes that the measure is inconsistent with any discipline of the GATT 1994, the question is not – as China seems to frame it – whether a Member may impose an indefinite import ban. Rather, the question is whether the measure actually at issue – which was limited in both time and substantive effect and which was adopted for the purpose of ensuring the consideration of a legitimate food safety issue – may be justified under Article XX of the GATT 1994. As the United States explained at length in its written submission, and as we will summarize below, the measure falls squarely within the exception under Article XX(b) of the GATT 1994 as necessary for the protection of human and animal life and health.

8. Finally, we will make a short introductory comment on what seems to be the theme of the third-party comments, and relatedly, on the outstanding U.S. request for a preliminary ruling. In particular, the thrust of the third party comments seems to be as follows: "Since this dispute is about a measure that affects the operation of the U.S. food safety system for poultry imports, should not the parties frame the issues under the disciplines set out under the specific WTO agreement that elaborates rules on many types of food safety measures?"

9. The answer to this question is two-fold. First, the mere fact that a measure implicates food safety does not dictate whether or how such a measure is covered by the SPS Agreement. To the contrary, the SPS Agreement – in its Annex A – contains a specific and detailed definition of covered measures. And as illustrated in the *EC – Biotech* dispute, even if a measure is covered by Annex A, it is far from trivial to determine how each of the differing SPS obligations apply to any particular measure.[1]

10. Second, it is China, as the complaining party, that has both the right and responsibility to allege how and why a measure is covered by the SPS Agreement, or any other relevant WTO agreement, if it wishes to receive DSB findings under that agreement. In this particular dispute, China has not chosen to make the case that the U.S. measure is covered by the SPS Agreement. In fact, China's request for consultations plainly states that "China does not believe that the US measures at issue restricting poultry products from China constitute SPS measures within the

[1] *EC – Biotech*, paras. 7.1326-7.1448.

meaning of the SPS Agreement."[2] China's request for panel establishment does not contradict this view. And in China's First Written Submission, China fails even to claim that the measure at issue falls within the scope of Annex A of the SPS Agreement.

11. China, however, has alleged that the U.S. measure is subject to, and is inconsistent with, disciplines under the GATT 1994. As a result, the United States has presented its defense of the measure under the relevant provisions of the GATT 1994. Had China requested consultations under the SPS Agreement, and had China made a *prima facie* case of how and why the U.S. measure fell under the SPS Agreement, the United States would have presented its defense under that framework. But the United States, as responding party, cannot be expected to present a defense based on claims never consulted upon and with respect to which China has failed to make even a *prima facie* case.

II. Section 727 is the Only Measure at Issue in this Dispute

12. China's First Written Submission asserts that two other measures – an alleged "indefinite moratorium" and the subsequently enacted Section 743 of the 2010 appropriations bill – also are, or also may be, inconsistent with the WTO Agreement. Section 727, however, is the only measure within the terms of reference of the Panel. The alleged "indefinite moratorium" does not exist, and the subsequent appropriations provision is not in the Panel's terms of reference.

13. China has no basis for the allegation of the separate, distinct measure that it calls "the Moratorium." In particular, China's citation to a provision in the 2008 appropriations bill does not establish an indefinite moratorium. The fact that Congress enacted a time-limited funding restriction on two occasions does not show the existence of an *"indefinite"* suspension of approvals.

14. Moreover, the second and more recent provision cited by China – Section 743 of the 2010 appropriations bill – disproves China's claim of the existence of an "*indefinite"* suspension of approvals. In fact, Section 743 has resulted in a lifting of the funding restriction, effective November 12, 2009.

15. In addition, contrary to China's assertions, Section 743 is not a measure that the Panel may examine for conformity with the covered agreements because it is not within the Panel's terms of reference as part of the "matter" referred to the Panel by the DSB. First, the parties did not consult on its provisions. Indeed, because Section 743 was drafted and adopted after consultations were held, it was impossible for consultations to be held on the measure. In particular, China issued its consultation request in April 2009, and Section 743 was adopted over six months later on October 21, 2009. The language of Section 743 evolved over time, and the version eventually enacted differed from the versions under consideration even at the time of panel establishment in July 2009.

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[2] Request for Consultations by China, WT/DS392/1, circulated 21 April 2009, para. 6.

16. Furthermore, the Appellate Body has emphasized that any subsequently adopted measures not precisely identified in the request for consultations must not "change the essence" of the measure actually covered in the request for consultations.[3] Here, Section 743 plainly changes the essence of Section 727. While Section 727 imposed a temporary funding restriction, the enactment of Section 743 has resulted in a removal of the restriction.

III. China Mischaracterizes the Legal Effect of Section 727 in U.S. Domestic Law

17. China asserts that the measure at issue in this dispute, Section 727, had the effect of banning imports of poultry from China and completely denying China access to the procedures under the Poultry Products Inspection Act (PPIA). China's characterization of the measure is incorrect.

18. The flaw in China's approach is its failure to take account of the "scope and meaning" of provisions contained in U.S. appropriations legislation generally, and of the particular conditions contained in Section 727 specifically.

19. Principles of U.S. domestic law dictate that a congressional funding restriction is limited to its explicit terms. Funding restrictions do not amend or modify the underlying law administered by an executive agency. Accordingly, these restrictions do not prevent the agency from taking actions *related* to the prohibited act as long as the agency does not take the prohibited act itself. Further, unless the funding restriction states otherwise, it only applies to the fiscal year covered by the appropriations bill in which it is contained.

20. Applying these general principles here, Section 727's legal meaning was limited to preventing USDA from "establishing" or "implementing" a rule allowing poultry products from China to be imported into the United States for a temporary six and a half month period during the 2009 fiscal year. That is all.

21. Section 727 did not create a permanent funding restriction that would impact FSIS's ability to establish and implement rules related to equivalency after its expiration on September 30, 2009. And indeed, as a consequence of Section 743 of the Fiscal Year 2010 agriculture appropriations act and USDA's letter to Congress of November 12, 2009, the funding restriction on the Food Safety and Inspection Service (FSIS) has been lifted.

22. Further, while it was still in effect, Section 727 did not prohibit FSIS from using funds to engage in activities under the PPIA that were simply *related* to an equivalency rulemaking for China. To the contrary, the Joint Explanatory Statement accompanying Section 727 actually directed FSIS to engage in this work, and FSIS did in fact do so during 2009. In particular, FSIS reviewed its documentation with regard to China's equivalency application, it sent a letter to

[3] *US – Upland Cotton (AB)*, n. 244.

China requesting additional information on its new food safety law, and it provided an equivalency action plan to Congress. FSIS could have done even more work, including the document analysis step under the PPIA, but its work was thwarted by China's failure to respond to its letter requesting additional information.

23. Finally, Section 727 did not – as China asserts – ban imports of poultry from China. Rather, the import prohibition was imposed by the PPIA – a measure which is not at issue in this dispute. And even in the absence of Section 727, FSIS procedures would not have necessarily allowed China to export poultry to the United States. With regard to processed poultry, FSIS needed to do an equivalency determination review before allowing China to export due to the time that had passed since the last audit. With regard to slaughtered poultry, FSIS had not completed an equivalency determination. In neither of these instances was it a foregone conclusion that FSIS would find China's inspection system to be equivalent.

24. In conclusion, the most that China can allege is that Section 727 prevented FSIS from taking final actions to specifically establish or implement an equivalency rule during fiscal year 2009 that *might* have otherwise occurred. China has no basis for alleging how, if at all, any final actions would have differed during the period covered by Section 727 had this measure not been enacted.

25. For these reasons, China mischaracterizes the legal effect of Section 727.

IV. Section 727 is Justified Pursuant to GATT Article XX(b)

26. In any event, Section 727 is justified pursuant to GATT Article XX(b). Section 727 was necessary to protect human and animal life and health from the risk posed by the importation of potentially unsafe poultry from China. Further, this measure was not applied in an arbitrary or unjustifiable manner and it was not a disguised restriction on international trade. Therefore, Section 727 was also consistent with the Article XX chapeau.

A. Section 727 Falls under the Scope of the Article XX(b) Exception

27. Past panels have indicated that two elements must be met for a measure to fall under the scope of the Article XX(b) exception.[4] First, the policy objective of the measure for which Article XX(b) was invoked must fall within the range of policies designed to protect human, animal or plant life or health. Second, the measure for which Article XX(b) was invoked must be necessary to fulfil its policy objective.

28. In the instant dispute, it is clear that Section 727's policy objective falls within Article XX(b)'s range of policies. Not only is there a significant risk from the importation of potentially

[4] *See, e.g., Brazil – Tyres (Panel)*, para. 7.40, *EC – Asbestos (Panel)*, para. 8.169.

unsafe poultry from China, but Section 727 was designed with the policy objective of protecting against this risk.

29. First, it is well known that poultry can contain bacteria, contaminants, and other additives and substances that pose a risk to human life and health. FSIS's equivalency process is designed to ensure that imported poultry is subject to standards and produced in conditions that achieve the same level of sanitary protection as the U.S. system, thereby reducing the risk that these pathogens, contaminants, and unsafe additives pose to U.S. consumers. However, after an equivalency determination is made, FSIS must rely on the other country's authorities to enforce its laws to achieve the requisite level of sanitary protection. Thus, if China's authorities fail to enforce the law, and poultry from China that is not produced under equivalent conditions is imported into the United States, then the life or health of U.S. consumers would potentially be at risk.

30. Similarly, avian influenza-infected poultry can pose a risk to animal life and health, as well as human life and health in certain circumstances. Since China is classified as a country where highly pathogenic avian influenza exists, U.S. animals could be subjected to a serious health risk if avian influenza-infected poultry from China were allowed to enter the United States. And entry of infected poultry from China could occur if Chinese authorities did not adequately enforce the law to ensure that poultry had been cooked or otherwise processed sufficiently to kill the disease and did not ensure that procedures to prevent commingling of product or smuggling were followed.

31. The risk posed by China's lax enforcement of its food safety laws is further highlighted by the series of food safety crises that have plagued China in recent years as a direct result of China's systemic food safety issues. The United States has already discussed these systemic problems and the particular episodes they have spawned at great length in our First Written Submission.[5] However, some of the most troubling reports about China's food safety problems and the most devastating crises that have occurred are worth highlighting yet once again today.

32. For example, the Asian Development Bank noted in 2007 that "unsafe food in the PRC remains a serious threat to public health."[6] The ADB then went on to note that "there is a pressing need for further reform."[7] Similarly, in 2008, the United Nations released a report highlighting some of the problems with China's enforcement of its food safety laws.[8] And at the time of this release, the World Health Organization's food safety chief characterized China's

[5] *See* U.S. First Written Submission, paras. 49-59.

[6] Exhibit US-21, p.1.

[7] Exhibit US-21, p.1.

[8] Exhibit US-22, p. 16.

food safety system as "disjointed," noting that this feature of the system had helped prolong the melamine crisis.[9]

33. Finally, one of the most troubling studies condemning China's systemic problems was published by *Global Health Governance.* This study pointed out that the reluctance of local officials in China "to enforce standards or regulations set at the provincial or national level makes it unlikely that food safety can be ensured consistently across the country."[10] Further, this report continued to note that "Corruption within the Chinese government poses a further challenge"[11] to food safety as this problem "extends from grass-roots cadres to the highest levels."[12]

34. These troubling reports should not surprise those who have followed China's food safety woes in recent years. Numerous high-profile crises have occurred, threatening the life and health of consumers and leading to frequent bans on Chinese products. A few recent examples include the following:[13]

- the EU's ban on all products of animal origin from China after finding residues of veterinary medicines in imports in 2002;
- Japan's ban on spinach from China after finding pesticides in two batches that were 180 times higher than Japanese standards in 2002;
- a counterfeit baby formula scandal that killed six infants in China's Anhui Province in 2004;
- a ban on seafood from China by South Korea, Japan, and Singapore after a cancer-causing agent was found in farmed fish in 2005;
- the intentional contamination of hundreds of different food products with a banned hazardous food additive known as Sudan red dye in 2005;
- Hong Kong's ban on contaminated turbot fish from China in 2006; the sale of pork tainted with clenbuterol, a banned feed additive in 2006 and 2009; and
- a smuggling scandal involving corruption at the highest levels of China's State Food and Drug Administration in 2007.

35. Other incidents related to China's food safety problems have hit closer to home for the U.S. consumer. For example, in 2005, USDA inspectors seized 165,000 pounds of smuggled poultry, much of which came from China. Then, in 2007, the use of melamine in China to adulterate feed and gain bigger profits led to the deaths of numerous U.S. household pets, with unofficial figures indicating the practice responsible for the death of up to 4,000 cats and dogs. Most recently, in 2008, it was discovered that Chinese producers were using melamine in

[9] Exhibit US-23.

[10] Exhibit US-25, p.5.

[11] Exhibit US-25, p.6.

[12] Exhibit US-25, p.6.

[13] *See* Exhibits US-25, US-26, US-27, US-28, and US-29.

products intended for human consumption, such as baby formula, milk and eggs. Consumption of melamine-tainted products led to over 300,000 illnesses and the deaths of at least 14 infants. As a result, the World Health Organization dubbed China's melamine crisis "one of the largest food safety events the agency has had to deal with in recent years."[14]

36. China's central government even recently acknowledged the extent of its problems with food safety. For example, in March 2009, China's Ministry of Health stated that "China's food security situation remains grim, with high risks and contradictions."[15] And as a result of these problems, China was forced to enact a new food safety law earlier this year.

37. At this point, it is worth explaining once again the direct relevance of these broad-ranging food safety crises to the safety of poultry from China. China's many crises raise troubling questions about China's ability to enforce its laws. And as the United States has pointed out, the question of enforcement is of particular importance in the context of an equivalency regime where the United States must rely on China to enforce its laws to ensure that the poultry it is exporting to the United States is safe. So, in conclusion, as all this troubling evidence makes clear, the importation of potentially unsafe poultry from China may pose a significant risk to human and animal life and health.

38. With this risk in mind, the U.S. Congress enacted Section 727. A brief look at the measure and its accompanying explanatory statement make clear that its policy objective was to protect against the risk posed to human and animal life and health by the importation of potentially unsafe poultry from China. In fact, the Joint Explanatory Statement accompanying Section 727 reads the following:

> There remain very serious concerns about contaminated foods from China and therefore the bill retains language prohibiting FSIS from using funds to move forward with rules that would allow for the importation of poultry products from China into the U.S.[16]

39. Similar language was also included in the Committee Report that accompanying the Fiscal Year 2008 funding restriction. This language reads as follows:

> Given the recent situation involving pet foods contaminated with melamine from China and the repeated, serious food contamination incidents within China, it is clear that we cannot rely on the Chinese government to ensure its plants adhere to U.S. standards in processing. Weak government controls in China, coupled with the high incidence of H5N1 [avian influenza] in that country, provide no assurance that the returned product is actually from U.S. poultry or that poultry carrying the H5N1 virus is not used instead of U.S.-produced poultry. While FSIS has said that the products would be safe because

[14] Exhibit US-35. *Also see* Exhibits US-30, US-34, and US-35.

[15] Exhibit US-37.

[16] Exhibit CN-33.

processing would kill any H5N1 viruses, U.S. inspectors will not be standing over the shoulders of Chinese workers; in fact, U.S. inspectors would visit the Chinese plants at most once a year.[17]

40. Any remaining doubt about the measure's policy objective is erased by reviewing the bill's legislative history. Most notably, the measure's author, Representative DeLauro, has repeatedly stated that the measure's purpose was to protect public health.[18]

41. Thus, based on Section 727's explicit language and its related legislative history, it is clear that the measure's policy objective was to protect against the risk posed to human and animal life and health from the importation of potentially unsafe poultry from China.

42. Section 727 was also necessary to achieve this important policy objective.

43. When considering the meaning of the word "necessary" in the context of Article XX(b), the Panel should look to the Appellate Body's Report in *Korea – Beef.* In that dispute, the Appellate Body explained that the term's meaning "must be considered in the connection in which it is used, as it is a word susceptible of various meanings."[19] The Appellate Body continued by stating that what is "necessary" is not limited to that which is "indispensable" or "of absolute necessity" or ''inevitable."[20]

44. In line with the Appellate Body's reasoning in *Korea – Beef*, the Panel in this dispute should consider Section 727's necessity in light of the severe risks posed by the importation of potentially unsafe poultry from China. As the United States has described, China's food safety system suffers from broad systemic problems, problems that FSIS is not typically faced with when making an equivalency determination. These include issues such as widespread smuggling, corruption, and the lax enforcement of China's food safety laws. Furthermore, China has experienced numerous food safety crises in recent years, such as the devastating melamine crisis that occurred shortly after FSIS had made a final determination about China's poultry processing system. In this context, Section 727 was necessary to protect against the risk to human and animal life and health posed by the importation of potentially unsafe poultry from China.

45. The Panel's conclusion that Section 727 was necessary to achieve this objective is bolstered by the analysis that past panels have used when faced with this very same question. Other panels have often found it helpful to weigh and balance the importance of the interests or values at stake and the contribution made by the measure to its policy objective to make a

[17] Exhibit US-42.

[18] *See e.g.,* Exhibit US-50.

[19] *Korea – Beef (AB)*, para. 160.

[20] *Korea – Beef (AB)*, para. 161.

determination on whether a measure was necessary.[21] In performing this weighing and balancing, panels have also considered it helpful to take into account the trade restrictiveness of the measure.[22] In the instant dispute, these factors all support the conclusion that Section 727 was necessary.

46. First, the protection of human and animal life and health is of vital importance. In fact, the panel in *Brazil – Tyres* noted that "protecting human health and life against life-threatening diseases ... is both vital and important in the highest degree."[23] The United States agrees with that panel's assessment. The need to protect human life and health from the risk posed by consuming potentially unsafe poultry from China is of the utmost importance, as is the need to protect animal life and health from the threat of avian influenza. Therefore, this factor strongly weighs in favor of a determination that Section 727 was necessary.

47. Second, there is a direct relationship between Section 727's policy objective and its contribution to food safety. Section 727 directly contributed to the protection of human and animal life and health by ensuring that FSIS did not establish or implement equivalency rules that would allow for potentially unsafe poultry to be imported into the United States. In addition, Section 727 set up a process by which FSIS could further evaluate the rules in light of China's systemic problems and recent food safety crises. Because Section 727 directly contributed to the achievement of its underlying policy objective, this second factor also favors a determination that the measure was necessary.

48. In addition, Section 727 was not permanent, but only applied for six and a half months. It did not completely stop work related to China's equivalency application, and it was explicitly designed to allow FSIS to move forward with the implementation and establishment of equivalency rules as soon as the funding restriction was lifted. And finally, it is noteworthy that even in Section 727's absence, it is unlikely that China would have exported any significant quantity of poultry products to the United States.

B. Section 727 Meets the Requirements of the GATT 1994 Article XX(b) Chapeau

49. To justify a measure under Article XX(b), the measure must also meet the conditions of the chapeau. These conditions require that the measure is not a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. In addition, the measure must not be a disguised restriction on international trade. Section 727 is neither of these.

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[21] *See, e.g.*, *Brazil - Tyres (Panel)*, para. 7.104.

[22] *See, e.g.*, *Brazil - Tyres (Panel)*, para. 7.104.

[23] *Brazil - Tyres (Panel)*, para. 7.111.

50. Section 727 was not discriminatory because there is no other country where the same conditions prevail as they did for China at the time the measure was enacted. No other country who was as far along in the equivalency process had experienced food safety crises of such a serious magnitude as China had. Neither had any country in that situation suffered from the systemic problems that plagued China's food safety system. As a result, there is no other country that had been as far along in the equivalency process where it can be said that the same conditions prevail.

51. In addition, even if the Panel considers Section 727 to be discriminatory, it was not applied in an arbitrary or unjustifiable manner. The New Shorter Oxford English Dictionary defines "arbitrary" as "based on mere opinion or preference as opp. to the real nature of things; capricious, unpredictable, inconsistent."[24] The same dictionary defines "unjustifiable" as "not justifiable, indefensible."[25] Further, the Appellate Body in *Brazil – Tyres* noted that the question of whether a measure is applied in a way that is "arbitrary or unjustifiable" should focus "on the cause of the discrimination, or the rationale put forward to explain its existence."[26] In this case, Section 727's application was not arbitrary or unjustifiable because there was a strong rationale for the measure's treatment of China that directly relates to the measure's policy objective.

52. As the United States has discussed at length, there are many legitimate concerns about China's food safety system, and therefore, Section 727 was necessary to protect against the risk posed by the importation of potentially unsafe poultry from China. Given China's many recent food safety crises and its systemic problems, which are issues that FSIS had not faced with any other country during the equivalency process, it was reasonable and justifiable for Congress to enact Section 727 so that FSIS could fully consider these issues with regard to China. In no way can this action be construed as either arbitrary or capricious. By contrast, the measure has a strong rationale for its application to China that is directly related to its policy objective.

53. The final requirement to justify a measure under Article XX(b) is that it must not be a disguised restriction on international trade. If a measure's intent is protectionist in nature, it will likely run afoul of this requirement.

54. In this dispute, the evidence clearly demonstrates that Section 727 is not a disguised restriction on trade. First, the text of the explanatory statement accompanying the measure explicitly indicates that the measure's policy objective was, in fact, to protect human and animal life and health, not to protect a domestic industry. As is worth repeating once more, the statement accompanying the measure explains: "There remain very serious concerns about contaminated foods from China and therefore the bill retains language prohibiting FSIS from

[24] Exhibit US-52.

[25] Exhibit US-53.

[26] *Brazil – Tyres (AB)*, para. 226.

using funds to move forward with rules that would allow for the importation of poultry products from China into the U.S."[27]

55. Additionally, the fact that Section 727 instructs FSIS to take actions *related* to the rulemaking also demonstrates that it was not enacted with protectionist intent. After all, if Section 727's objective were to restrict trade, it would not make sense to include language instructing FSIS to set the stage for expeditious action on the implementation and establishment of the equivalency rules as soon as the funding restriction was lifted.

56. Statements by members of Congress directly involved with Section 727's enactment further support this view. As mentioned previously, Representative Rosa DeLauro has emphatically stated on numerous occasions that the measure's policy objective is based on health concerns and is not based on trade concerns.

57. Finally, the U.S. poultry industry's widespread opposition to the measure also weighs against a determination that the measure is based on trade objectives. In fact, while Section 727 was in effect, 56 major U.S. companies and trade associations that represent the domestic industry wrote a letter to President Obama asking him to oppose an extension of Section 727.[28] If Section 727's purpose were to restrict trade, it seems unlikely that nearly all of the industry's most influential members would express opposition to it.

58. Accordingly, Section 727 meets the requirements of the chapeau and the measure is justified under GATT Article XX(b).

V. U.S. Preliminary Ruling Request

59. As explained by the United States in its request for a preliminary ruling and in Part VIII of its First Written Submission, the Panel should find that any claims by China under the SPS Agreement are not within the terms of reference of this proceeding. In short, Article 1.1 of the DSU states that consultations must be requested pursuant to the consultation and dispute settlement provisions of each covered agreement for which dispute settlement under the DSU is sought. But here, China's request for consultations plainly states that "China does not believe that the US measures at issue restricting poultry products from China constitute SPS measures within the meaning of the SPS Agreement."[29]

60. China's *ex post facto* explanation that it wanted to invoke claims under the SPS Agreement as "alternative claims" is unavailing. First, regardless of what China subjectively intended, the governing document is the request for consultations itself. And China's request for consultations, as written, does not request consultations in order to pursue alternative claims.

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[27] Exhibit CN-33.

[28] Exhibit US-55.

[29] Request for Consultations by China, WT/DS392/1, circulated 21 April 2009, para. 6.

Instead, it asserts that the U.S. measures at issue are not SPS measures, and makes a conditional request based on future developments that could not be resolved in the consultation process.

61. Second, Members routinely invoke alternative claims by stating just that: that particular claims are presented "in the alternative." China in its request for consultations could have, but did not, present SPS claims in the alternative.

62. The issue presented by China's consultations request is not a technicality. In raising the deficiency of China's consultations request, the United States is pursuing an important systemic concern. A complaining party should not be free to claim that it is not invoking the dispute settlement provisions of a covered agreement and then later claim that it did. If China's approach here were to be accepted, it could lead to more and potentially greater confusion in future disputes. The DSU provisions are clear and were agreed upon – a complaining party's consultations request "shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint." As stated in the U.S. preliminary ruling request, clarity in the request for consultations is important for the overall operation of the dispute settlement system.

63. China's First Written Submission nonetheless questions the motives of the United States in raising this important systemic issue. As China is well aware, however, any such assertion is unfair and unfounded. As noted in its Preliminary Ruling Request, the United States alerted China to the deficiency in China's consultations request at the earliest possible moment. At that time, China could have submitted an amended request seeking consultations under Article 11 of the SPS Agreement and indicating that it was raising SPS claims – in the alternative or otherwise. If China had done so, that would have been the end of the matter, with very little effect on the overall timing of the dispute.

VI. Response of the United States to the EU Request for Enhanced Third Party Rights

64. The United States agrees with China that the Panel should not accept the EU's request that the Panel alter its working procedures in order to provide enhanced third party rights.

65. The present dispute is not comparable to past cases where panels have granted enhanced third-party rights. For example, in *EC – Bananas* and *EC – GSP*, the panel granted enhanced rights because third parties had substantial trade interests in the measure at issue in the dispute. And in *EC – Hormones*, the panel granted enhanced rights to what were essentially co-complainants in parallel proceedings.

66. But here, the basis for the EU's request is that issues under the SPS Agreement may be further developed after the first substantive meeting. The United States submits that this rationale cannot suffice as the basis for granting enhanced third party rights. It is a common element of nearly every dispute that the legal and factual issues continue to develop after the first substantive meeting. Indeed, if this were not the case, the DSU's requirement for a second

substantive meeting would be pointless. Accordingly, if the EU's rationale were adopted, it could result in enhanced third party rights in most if not all disputes.

VII. Conclusion

67. Mr. Chairman, members of the Panel, this concludes our opening statement. We would be pleased to respond to any questions you may have.